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NOTES OF INDIAN CASES.

DAL BAHADUR SINGH *v.* BIJAI BAHADUR SINGH, L.R. 57 I.A. 14: I.L.R. 52 All. 1: 58 M.L.J. 446 (P.C.).

The question in this case was whether the adoption by a widow was with the authority of her husband. Their Lordships say that "a grave and serious *onus* rests on any person who seeks to displace the natural succession of property by an act of adoption and that, in such a case, the proof requires strict and almost severe scrutiny, and the longer the time goes back from the date when the power was given to the time when it comes to be examined, the more necessary it is having regard to the fallibility of human memory and the uncertainty of evidence given after the lapse of such time, to see that the evidence is sufficient and strong."

In this case the husband died in 1860. In 1914 the widow purported to exercise the alleged power given by the husband and adopted her brother's grandson and she died in 1915. In those circumstances, the statement by the widow that she had adopted and that she had authority of the husband to make the adoption was held to be not a statement against the pecuniary or proprietary interest of the widow and as such was not admissible under section 32, clause (3) of the Indian Evidence Act. Their Lordships explain saying "The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But this sanction is manifestly wanting in the case of a Hindu widow who, after a life-long enjoyment of her husband's property, desires at the end to pass it on to her own relations and, for this purpose, goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband."

The doubt that crosses one's mind is that even so, it is only a circumstance that goes to the weight of the evidence and not to its admissibility unless the adoption was hedged in with the restriction that she should retain her life estate.

That statement was sought to be made evidence also under section 33 of the Evidence Act as a statement made by a witness in a judicial proceeding. The statement was made in a mutation proceeding where, however, the issue that arose was only as to possession and further the Commissioner had ruled in the case that the reversioner had no right to cross-examine the widow on the alleged authority to adopt, though as a matter of fact she had been cross-examined in effect on the question. Their Lordships hold that to make the statement admissible in evidence, the other side must have had both the right and the opportunity and not merely the opportunity without the right and also that the issues in both judicial proceedings must be substantially the same.

GUDIVADA MANGAMMA *v.* MADDI MAHALAKSHMAMMA, L.R. 57 I.A. 56: I.L.R. 53 Mad. 167: 58 M.L.J. 184 (P.C.).

This decision sets at rest the conflict in India not only between the various High Courts (see *Subramania Aiyar* v. *Sellammal*,[1] *Dalgleish* v. *Damodar Narain Chowdhry*[2] and *V. S. T. Thamsundaseen* v. *S. M. A. R. R. M. Chetty Firm*[3], but also between the various Benches of the same High Court (see *Raghunathasami Aiyangar* v. *Gopaul Rao*,[4] *Kesho Prasad Singh* v. *Shiva Saran Lal*[5] and *Mahabir Prasad Singh* v. *Anup Narain Singh*[6]). The effect of the decision is that neither interest accruing after the date of plaint up to the decree nor mesne profits so accruing could be taken into account in estimating the value of the suit for the purposes of Privy Council appeal.

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1. (1915) I.L.R. 39 M. 843: 30 M.L.J. 317.
2. (1906) I.L.R. 33 C. 1286.
3. (1925) I.L.R. 3 Rang. 405.
4. (1922) 43 M.L.J. 622.
5. (1918) 3 Pat. L.J. 317.
6 (1918) 3 Pat. L.J. 377.

KAYASTHA COMPANY, LIMITED *v.* SITA RAM DUBE, I.L.R. 52 All. 11 (F.B.).

We are glad to note that the phantom that was raised by *Sheo Prasad* v. *Naraini Bai*[1] is effectively laid by this decision. While noticing that case, we pointed out that there is no justification in the language of Art. 182, cl. 5 for importing as an essential condition any *bona fide* intention of prosecuting the previous application. *Bona fides* may bring applications which may not otherwise be in *accordance with law*, within the clause, but absence of *bona fides* cannot take applications which otherwise satisfy the conditions of the clause out of the clause. In other words, *bona fides* may assist the decree-holder; the absence of it cannot take away his *prima facie* rights. *Bona fides* may be of avail to the decree-holder to give him the benefit of S. 14 of the Act. The question has been elaborately discussed in the various judgments.

KISHAN SARUP *v.* BRIJRAJ SINGH, I.L.R. 51 A. 932.
RAM SARAN DAS *v.* BAGHWAN SINGH, I.L.R. 52 A. 71.

On the question of the son's liability for the pre-partition debts of the father after partition the Allahabad High Court seems to be divided against itself. The case first named follows the Madras view, *Subramania Aiyar v. Sabapathy Aiyar*[2]; on the other hand the second follows the view taken in the earlier case in *Gaya Prasad* v. *Murlidhar*,[3] viz., that the liability ceases with partition. We think the view taken in the first of these cases is right and in accordance with principle. If the view expressed by Lord Shaw in *Sahu Ram* v. *Bhup Singh*,[4] viz., that the liability of the son arose only after death of the father, sale in execution of decrees against father being supported on the basis of the power of the father to sell for antecedent debts, was correct, then of course it followed that with the cessation of that power on partition, the liability of the property allotted to the son at such partition for such debts also ceased. But that view of Lord Shaw has not commanded the support of the Privy Council who have in full Board in *Brij Narain* v. *Mangal Prasad*[5] reaffirmed the view expressed in the earlier cases of the Privy Council, viz., *Girdharee Lall* v. *Kantoo Lall*,[6] *Deen-*

1. (1925) I.L.R. 48 A. 468.
2. (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).
3. (1927) I.L.R. 50 A. 137.
4. (1917) L.R. 44 I.A. 126: I.L.R. 39 A. 437: 33 M.L.J. 14 (P.C.).
5. (1923) L.R. 51 I.A. 129: I.L.R. 46 A. 95: 46 M.L.J. 23 (P.C.).
6. (1874) L.R. 1 I.A. 321.

dyal v. *Jugdeep Narain Singh*[7] and *Nanomi Babuasin* v. *Modhun Mohun*,[8] that the sons are liable even during the lifetime of the father. With the reaffirming of that view, there would seem to be no justification for holding that the son's liability ceases on partition. But there are various indirect ways in which partition might affect the son's liability, for instance, if a decree has been passed personally against the father and not in his representative capacity, there could no longer be power to execute the decree against the property allotted to the sons though the decree might itself furnish a new cause of action against the sons as held in *Periasami* v. *Seetharama Chettiar*[9] provided the decree was passed at a time when the son was joint with the father. Similarly acknowledgments and renewals by the father after partition cannot be availed of by the creditor as against the sons. (*Rathna Naidu* v. *Aiyanachariar*,[10] *Peda Venkanna* v. *Sreenivasa Deekshatalu*[11] and *Subramania Moopanar* v. *Subbiah Aiyar*.[12]) If the partition was with a view to defeat the remedy of the decree-holder, it may not avail to protect the son against the execution but in the absence of fraud, the decree-holder cannot execute the decree against the son, because the power to sell in execution is derived from the father's power to sell in discharge of his debts. (*Nanomi Babuasin* v. *Modhun Mohun*.[8]) If the decree is passed against the father in his representative capacity, then, of course, it could be executed against the sons provided that notice is given to the sons in execution. (*Kunhi Kannan* v. *Suppi*.[13]) The view taken by the Madras Full Bench assimilates the pious obligation to an ordinary joint family obligation such as under a binding family contract. (*Ramachandra Padayachi* v. *Kondayya Chetty*.[14]) Mr. Justice Kumaraswami Sastri suggests that if there should be adequate provision for payment of debts at the partition, then also the son's liability should cease. (*Subramania Moopanar* v. *Subbiah Aiyar*.[12]) It is recognised by his Lordship that his view is opposed to that of the Full Bench. It is not a necessarily impossible or illogical view. The liability of the son is not an independent liability. It is a liability ancillary to that of the father. So long as the father is alive the

7. (1877) L.R. 4 I.A. 247: I.L.R. 3 C. 198 (P.C.).
8. (1885) L.R. 13 I.A. 1: I.L.R. 13 C. 21 (P.C.).
9. (1903) I.L.R. 27 M. 243: 14 M.L.J. 84 (F.B.).
10. (1908) 18 M.L.J. 599.
11. (1917) I.L.R. 41 M. 136: 33 M.L.J. 519.
12. (1930) M.W.N. 658.
13. (1908) 18 M.L.J. 132.
14. (1901) I.L.R. 24 M. 555.

sons can be sued only along with the father and not independently. It may well be held in the circumstances that the liability of the son ceases on his making adequate provision for the payment of the debts although those arrangements miscarry owing to the default of the father or the negligence of the creditor.

MUSSAMMAT JANO *v.* NARSINGH DAS, I.L.R. 11 Lah. 29.

Although Art. 123 of the Limitation Act is not confined to suits against executors and administrators only as was held in earlier cases (see *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao*[1], affirmed on appeal *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[2]), it does not follow that every suit by the heir of any person dying intestate for his share will come under that Article. The force of the word "distributive" in Art. 123 cannot be ignored. In the case of a Mahomedan it has been held that, on his death, his co-heirs take the property as tenants-in-common and no person is legally charged with the duty of distributing the estate. In such cases, therefore, Art. 123 has been held inapplicable. (*Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah.*[3])

It has been suggested (see *Shirinbai* v. *Ratanbai*[4]) that the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*[5] extends the scope of the applicability of Art. 123. The authority of that decision, however, does not go so far as to overrule impliedly the Full Bench decision of the Madras Court. Nor is there anything in the later Privy Council decision in *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[2] which affects the aforesaid Full Bench decision. In the case of a suit for a legacy, Art. 123 is certainly applicable and the Privy Council decision cannot be extended to suits for a share of an intestate's estate. A Full Bench of the Allahabad Court has expressly re-affirmed the correctness of the Madras Full Bench decision after an elaborate examination of all the later authorities including the two Privy Council decisions (*Rustam Khan* v. *Mt. Janki.*[6]) The Bombay High Court also holds the

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1. (1922) I.L.R. 46 M. 190: 43 M.L.J. 486 (F.B.).
2. (1925) L.R. 52 I.A. 214: I.L.R. 48 M. 312: 48 M.L.J. 627 (P.C.).
3. (1910) I.L.R. 34 M. 511: 20 M.L.J. 288 (F.B.).
4. (1918) I.L.R. 43 B. 845.
5. (1916) L.R. 44 I.A. 42: I.L.R. 44 C. 379: 32 M.L.J. 71 (P.C.).
6. (1928) 111 I.C. 809 (F.B.).

same view in later cases, *Kallangowda* v. *Bibishaya*,[7] *Nurdin* v. *Bu Umrao*[8] and *Bai Jivi* v. *Bai Bibamboo*.[9]

Mahomedan co-heirs are not under an obligation to divide the property *inter se* according to their shares. They can under the law hold and continue to hold it in common till they choose to have a partition. Art. 123 does not penalise them for not enforcing a partition within twelve years of the death of the intestate ancestor, where they have once agreed expressly or impliedly to hold the property as co-owners.

THIRAJ *v.* THE CROWN, I.L.R. 11 Lah. 55.

The new amendment of Ss. 195 and 476 of the Criminal Procedure Code by the Act of 1923, while abolishing the sanction procedure has made the Court itself prefer a complaint. It provides for a right of first appeal to one higher authority. We agree with the majority view of the learned Judges in this case that an appeal is provided under section 476-B to any person against whom a complaint under section 476 or 476-A has been made and the words "such a complaint" do not limit the right of appeal only to cases where the Court has acted on the application of a party and not *suo motu*. The narrower interpretation of the dissenting Judge does not seem to be sound. The High Court of Allahabad also has taken the same view in *Emperor* v. *Ram Prasad*.[1]

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7. (1920) I.L.R. 44 B. 943.
8. (1920) I.L.R. 45 B. 519.
9. A.I.R. 1929 B. 141.
1. (1929) I.L.R. 52 A. 79.

MAULU *v.* THE CROWN, I.L.R. 11 Lah. 115.

As observed by the English Court of Appeal in *R.* v. *Oliver Taylor*[1] "It has been said over and over again that the mere fact that a man has been convicted many times is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself." Notwithstanding section 75 of the Indian Penal Code, a sentence of transportation for life for the offence of stealing Rs. 10-2-6 by picking a pocket in a crowd, is one that the learned Judges could not possibly sustain. The observations in the judgment are a refreshing reminder to the subordinate magistracy to administer the law in this matter not indeed tempered with mercy but with sound commonsense. The elasticity of the provisions of the Penal Code should not be abused. The legislature evidently trusts the Courts to exercise a sound judicial discretion. It is noteworthy that the Criminal Procedure Code explicitly provides that a question of sentence is a question of law even in a trial by Jury (section 418).

NARAYANA SAH *v.* SANKAR SAH, I.L.R. 53 Mad. 1: 57 M.L.J. 685 (F.B.).

If in the name of some imagined theory of Hindu Law, their Lordships had permitted themselves to answer the reference in a different sense, the result would have been to make the Hindu Law of partition a bundle of absurdities. The so-called theory of Hindu Law is largely a creation of Courts and to make a fetish of it, would be as absurd as inequitable. To illustrate what we say with a concrete example: Let us take it that *A* and *B* are two brothers, *A* having no children and *B* having a son. If a partition should take place normally between the two branches *A* would take half and *B* with his son would take the other half. Now assume that *B's* son divides himself off from his father and uncle by a unilateral declaration as he is entitled to do under the recent rulings of the Privy Council. If the argument is right he would be entitled to his fourth and the rest unless they declare their intention to be divided simultaneously with him must share the balance equally between them, that is to say the share of the uncle is reduced from half to

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1. (1924) 18 Cr. App. Reports 143.

three-eighths. The communication may be made to the manager so that even without an opportunity being given to him to express his concurrence *A's* share might be reduced. Are the shares of the members to be dependent upon the accident as to who declares his intention first? What is the principle on which a distinction is to be made between this case and the case of others preferring to continue joint? No exercise of volition is necessary to continue joint—an exercise of volition is necessary only to divide. If nothing is done by them, jointness of status continues as between the other members. Nor is there a *status* intermediate between one of division in status and of complete division which would preclude the application of the rule during that period. It is not right to say that the Hindu Law did not contemplate partial partition. Partition of a member by relinquishment of his share is referred to by all the writers. Nor are equities ignored at partition. For instance, in allotting a share to the mother, properties which have been presented to her by the father or grandfather are to be taken account of. (*Mitakshara,* Chaps. I—VII, 2 and Chaps. II—XI, 35.) When partition is sought of property which belonged to the family and was lost but was subsequently recovered by the exertions of a member, he is given a double share in it. These ought to be taken as illustrative.

Further, as pointed out in the judgments under review, recognition of alienation of the shares of co-parceners has made a serious breach in the doctrine. Under the decisions the alienee is entitled to the share as at the date of alienation and any further accretion to the share would go to the benefit of the co-parcener. New births into the family do not affect the alienee. Unauthorised alienations by a co-parcener also introduce occasions for accounting; the properties alienated are debited to the share of the alienor.

Either there is no scope for partial partition under the Hindu Law and all further relationship must be on the footing of re-union or some such rule as that laid down in this case must be recognised. The Courts have not got the right to apply rules which can apply only to normal conditions to the abnormal conditions introduced by partial partition. The rival view is neither in accordance with principle nor with equity but is the result of loose thinking.

BALASUNDARA MUDALIAR *v.* MAHOMED OOSMAN SAHIB, I.L.R. 53 M. 29: 57 M.L.J. 154.

Agreement to procure success by prayer might be regarded as either vitiated by impossibility under S. 56 of the Contract Act or as not being proper subject for contract, somewhat like social or moral engagements. The particular conclusion might depend on the temperament of the Judge. Agreement to offer prayer for success is quite another matter. It involves physical labour and so long as offering prayer is not regarded as fraud or chicanery, there does not seem to be any reason why an agreement to remunerate such services should not be enforced. If the fact that the cause is unjust is to vitiate it, many a lawyer must go without remuneration. Success in cases might be lawfully attained without there being any justice in the case. The deity propitiated might well be counted on to see that his intervention does not make the Court deviate from the path of law or justice. The whole trouble comes from thinking that prayer offered to deity in India partakes something of the character of black magic. The doubts of the Chief Justice as to the soundness of the case *Bhagwan Dat Shastri* v. *Raja Ram*[1] are fully justified.

SUBBAYYA *v.* ANANDA RAMAYYA, I.L.R. 53 M. 84: 57 M.L.J. 826 (F.B.).

The view taken by the majority in this case is that the marriage expenses of the daughter are equally a charge on the father's share as the share of the sons when the partition takes place during the life-time of the father. After the father dies the sons are liable to marry them. Mitakshara gives for the purpose a 1|4th share to each daughter. That share has no reference to the father's share. In certain contingencies the shares to be so distributed might be more than the father's share which he would have got if he were alive at the partition. Take for instance a case, where there are 6 sons and 9 daughters. The 9 daughters would take 9|60, which is more than the father's share 1|7th. In the case of the maintenance of a deceased co-parcener's widow, the liability of the survivors extends to a 1|3rd of his share or if the property is small to the whole of it. It does not go beyond that share. The same would be the case with the maintenance of the wives of disqualified heirs. Seeing that there is no reference to the father's share in determining the daughter's share,

1. (1927) I.L.R. 49 A. 705.

and specially having regard to the fact that in certain contingencies the shares allotted to the daughters might be more than those of the father, one is drawn to the conclusion that it is not a case of the father's moral obligation maturing into a legal obligation on his death. Again one can understand the moral obligation of a man developing into a legal obligation when his self-acquired property descends on another. In the case of joint family property, the surviving co-parcener takes in his own right and there is no scope for the application of the principle. The true principle is that there is the obligation already which when the family is in a joint condition is discharged by the head, but when the head is removed from that position by death or partition, the liability devolves on the next head or *pro rata* on the persons who take the property as the case may be. It is on this principle the father's debt devolves on the son even during the life-time of the father. The father's position is not like that of an ordinary co-parcener. The ordinary co-parcener's share is not taken by the other co-parceners till his death. In the case of the father, as each son is born, his right is cut down *pro tanto* and the process may go on till at last it may so happen that his share is insufficient to meet the marriage expenses. One can well visualise the situation if one realises that according to the old theory, self-acquisition stands on the same footing as ancestral property. This is an obligation recognised by the Hindu Law and enforced in many a text by religious and social sanctions.

THAYAMMAL *v.* MUTHUKUMARASWAMI CHETTIAR, I.L.R. 53 M. 119: 57 M.L.J. 588.

Payment by one of several mortgagors would have been sufficient to save limitation, if the question depended on S. 20 but S. 21 makes payments by one of the joint contractors ineffective for the purpose. In cases not covered by S. 21, payments by one person may make the others liable in respect of the same obligation though the person making payment is not authorised in that behalf by the others provided he was a person liable to make the payment.

MA YAIT v. THE OFFICIAL ASSIGNEE, I.L.R. 8 Rang. 8.

By an ordinary settlement, the settlor transferred practically the whole of his property to trustees on trusts as to property comprised in the first three schedules to the settlement to distribute the income in a particular manner and after the youngest of his children attained the age of twenty, to sell the property and distribute the proceeds in equal shares between the children then surviving, the issue of any child who was dead to represent his father's share; and as to property in the fourth schedule, the property was not to be distributed until the death of the youngest child, and it was to be divided then amongst the children living at that date. The eldest son alienated his interest in the corpus before it vested in him and the question for decision was whether it was not the transfer of a mere possibility within the meaning of section 6 (*a*) of the Transfer of Property Act. The High Court upheld the alienation on the ground that the interest of the assignor in the corpus was a *vested* interest, and in that way distinguished the case of a Hindu reversioner to a woman's estate. But the Privy Council definitely reject that ground. They, however, proceed to say that "the contingent interest which the children took . . . was something quite different from a mere possibility of a like nature of an heir-apparent succeeding to the estate, or the chance of a relation obtaining a legacy, and also something quite different from a mere right to sue". In England, their Lordships point out that "it is a well ascertained form of property . . . in respect of which it is quite possible to raise money and to dispose of in any way that the beneficiary chooses." A distinction has been recognised in England between contingent interests and mere expectancies, the former being regarded as a possibility coupled with an interest. (See for a discussion of it *Annada Mohan Roy* v. *Gour Mohan Mallik.*[1]) This distinction has not so far been definitely adopted in this country in view of the general language of section 6 (*a*) of the Transfer of Property Act. Though their Lordships lay down the rule categorically and without any discussion as to whether the policy of the legislation here is not wider (*cf.* their observations in *Annada Mohan Roy* v. *Gour Mohan Mullick*[2]) the pronouncement must be accepted as importing the English rule here.

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1. (1920) I.L.R. 48 C. 536 at 552.
2. (1923) L.R. 50 I.A. 239: I.L.R. 50 C. 929 at 936, 937: 45 M.L.J. 617 (P.C.).

PANDIT BINDRABAN DINANATH *v.* OFFICIAL RECEIVER, TO C. T. A. R. A. FIRM, I.L.R. 8 Rang. 187.

In view of the practical unanimity of opinion among the several High Courts to the effect that when an adjudication is annulled under section 43 of the Provincial Insolvency Act the Courts can vest the property, under section 37, in a receiver and continue all the proceedings theretofore pending, the discussion of the vexed question whether under section 43 the Court has no option but to annul an adjudication after the period fixed for discharge has expired becomes largely academical. The point made by the Full Bench in *Palani Goundan* v. *Official Receiver, Coimbatore*[1] and Jwala Prasad, J., that section 37, clause (2) contemplates an order of annulment being passed and that therefore there cannot be an automatic annulment on the expiry of the period is met by the decision under review. The error underlying the reasoning in *Palani Goundan's case*[1] is the assumption that where the Court has to pass an order, it must also have the power to say 'no' under certain circumstances. When a suit is declared abated, the Court has to pass a formal order dismissing the suit but that does not mean that the Court can refuse to pass that order. The other ground adopted in *Palani Goundan's case*[1], *viz.*, that based on the Privy Council decision in *Badri Narain* v. *Sheo Koer*[2], is more difficult to be met. As Curgenven, J., points out, the Privy Council case was decided when section 148, Civil Procedure Code, had not been enacted and the language to be interpreted in section 549 of the old Civil Procedure Code (now Order 41, Rule 10) was as mandatory as in section 43 of the Provincial Insolvency Act. The discussion in the Rangoon case under review, based on section 5 of the Provincial Insolvency Act overlooks this fact that *Badri Narain's case*[2] did not go on any provision corresponding to section 148, Civil Procedure Code. The Judicial Committee apparently hold that the mandatoriness of the provision is not inconsistent with the power of the Court to extend the period. The other decision in *Ram Krishna Misra, Ex parte*[3], which has also been relied on, has been overruled by a Full Bench of the Patna High Court in *Gopal Ram* v. *Magni Ram*[4]. Now that Madras has also fallen in line with the other High Courts, it remains to be seen what view will be taken as a result of these decisions by the Rangoon High Court, when the question next comes before it.

1. (1929) I.L.R. 53 M. 288: 58 M.L.J. 369 (F.B.).
2. (1889) L.R. 17 I.A. 1: I.L.R. 17 C. 512 (P.C.).
3. (1924) I.L.R. 4 Pat. 51.
4. (1927) I.L.R. 7 Pat. 375 (F.B.).

GURUDAS KUNDU CHOWDHURY *v.* HEMENDRA KUMAR ROY, L.R. 56 I.A. 290: I.L.R. 57 Cal. 1: 58 M.L.J. 74 (P.C.) and GRAY *v.* BHAGU MIAN, L.R. 57 I.A. 105: I.L.R. 9 Pat. 621: 58 M.L.J. 215 (P.C.).

The decisions of the Privy Council in these cases set at rest some points on the question of mesne profits. As early as 1881, it was laid down by the Judicial Committee in *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal*[1] under the Civil Procedure Code of 1859 that where a decree was passed for mesne profits without specifying the period for which it was to be calculated, it was to be understood as meaning for the whole period till possession was delivered to the decreeholder and not merely till the date of suit. The first question in the first case under notice arose with reference to the same point under the Code of 1882 and their Lordships held that the decision would be the same under that Code as well. As the reasons given for the decision in *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal*[1] hold good even under the Code of 1908, we venture to submit that the decision would be the same even if a decree in those terms passed under the Code of 1908 has to be construed.

The further question that arose in the cases was regarding the calculation of mesne profits where the defendant was not in actual possession, whether it was to be assessed on the basis of the rental or the value of the produce less the necessary charges. This question was by no means clear on the decisions in India as pointed out by the Calcutta High Court in *Pramada Nath Roy* v. *Secretary of State for India.*[2] After the decisions under notice it may be taken as clear that where the defendant has let the properties to tenants and is not himself in actual possession, mesne profits as against him is generally arrived at on the rental basis and not on the basis of the value of the actual produce. It may also be taken as settled by the first decision under notice that a decree for mesne profits against the defendant and his tenants in possession is not one against joint tortfeasors, so as to entitle the decreeholder to recover the value of the actual produce against either at his option.

There is also one other matter which even though it appears from the definition of "mesne profits" in the explanation of section 211 of the Code of 1882 and section 2 (12) of the Code of 1908, is sometimes overlooked. It has sometimes been laid

1. (1881) L.R. 8 I.A. 197: I.L.R. 8 Cal. 178 (P.C.).
2. (1926) I.L.R. 53 Cal. 992.

down that what the plaintiff lost is the basis of the assessment of the mesne profits and not what the defendant actually got or could with reasonable diligence have got, so that if the plaintiff had simply let the lands himself to tenants when he was originally in possession, he could recover only on the rental value. Their Lordships have pointed out in these cases that the proper basis is what the defendant got or could have got and not what the plaintiff was getting prior to his dispossession. It is, we believe, on this view that their Lordships overruled the contention in the first case that as the plaintiff himself was a Zemindar and would only have let the lands to tenants and not have cultivated them himself, he was entitled to recover mesne profits only on the basis of the rental value.

JANAKINATH SINGHA RAY *v.* NIRODBARAN RAY, I.L.R. 57 Cal. 148.

In this case, a suit for the possession of immoveable properties and mesne profits was brought before the Civil Procedure Code of 1908 came into force and a decree for possession and a preliminary decree for mesne profits was passed after the coming into force of the Code of 1908; and the learned Judges have held that in such a case, the further proceedings are governed by the new Code and the suit must be held to be still pending to be disposed of by a final decree, after the ascertainment of the mesne profits in the course of the suit itself. In coming to this conclusion, the learned Judges have distinguished the decision of the Privy Council in *Kedarnath Goenka* v. *Anant Prasad Singh*[1] on the ground that in that case, though the suit was brought under the old Code, the first Court passed its decree for possession and directed the ascertainment of mesne profits when the old Code itself was in force. But what is important in the Privy Council case is that the decree of the Appellate Court which in law superseded that of the first Court was passed after the coming into force of the Code of 1908. If, therefore, the true view is that the decree of the Appellate Court supersedes that of the Lower Court even in cases of affirming decrees, cf. *Kristnama Chariar* v. *Mangammal*,[2] *Venkayya* v. *Sathiraju*,[3] and *Jowad Hussain* v. *Gendan Singh*,[4] it may be open to question whether there is much force in the distinction drawn by the learned Judges.

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1. (1925) L.R. 52 I.A. 188: I.L.R. 4 Pat. 507: 48 M.L.J. 482 (P.C.).
2. (1902) I.L.R. 26 Mad. 91 (95) (F.B.).
3. (1921) I.L.R. 44 Mad. 714: 41 M.L.J. 117.
4. (1926) L.R. 53 I.A. 197: I.L.R. 6 Pat. 24: 51 M.L.J. 781 (P.C.).

Even assuming that the learned Judges were right in holding that the new Code applied to the proceedings for the ascertainment of mesne profits, it is somewhat strange that it was assumed before them that when after the passing of the preliminary decree for mesne profits a party to the suit dies and his legal representatives are not brought on the record within 90 days, the suit would abate as regards the deceased person. Whatever might have been the understanding of the law before the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*,[5] there is ample authority after that decision, for the view that after the passing of a preliminary decree, there can be no question of any abatement of the suit under Order 22 of the Civil Procedure Code. Reference may be made in this connection to the decision of a Full Bench of the Madras High Court in *Perumal Pillai* v. *Perumal Chetty*[6] which overruled the decisions in *Subbarayudu* v. *Ramadasu*[7] and *Natesa Pillay* v. *Kannammal*[8], which held that a suit abated if the legal representatives were not brought on the record within the time limited, though the death of a party took place after the preliminary decree. That this is the view even in Calcutta, seems to be clear from *Nazir Ahmad* v. *Tamijaddi*.[9] See also *Rahim Bakhsh* v. *Walaiti Ram*,[10] *Peetha Swamigadu* v. *Ramachandrayya*[11] and *Debinath* v. *Bissesar Das*.[12] For the above reasons, we venture to doubt whether the concession made by the appellant's counsel was right and the suit should not in any view have been held not to have abated owing to the fact the legal representatives of the deceased parties were not brought on the record within ninety days after their death.

KRISHNAJI ANAJEE *v.* ANAJEE DHONDAJEE, I.L.R. 54 Bom. 4.

The plaintiff, in this case, sued for a declaration that two gift deeds executed by his father in favour of his other sons would not affect him as the properties gifted were set apart in the partition for the maintenance of the father and his wives during their life-time. The suit was brought in the life-time of the father himself but after six years of the gift deeds and the learned Judges held that the suit was barred under Art. 120

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5. (1924) L.R. 51 I.A. 321: I.L.R. 4 Pat. 61: 47 M.L.J. 441 (P.C.)
6. (1928) I.L.R. 51 Mad. 701: 55 M.L.J. 253 (F.B.).
7. (1921) I.L.R. 45 Mad. 872: 42 M.L.J. 301.
8. (1923) 19 L.W. 173.
9. A.I.R. 1929 Cal. 430.
10. A.I.R. 1930 Lah. 329.
11. (1929) 120 I.C. 77 (1).
12. A.I.R. 1929 Nag. 206.

of the Limitation Act and that it was not governed by section 23 or Art. 127 or 144 of the Act. It can hardly be doubted that the decision on all the points is fully supported by authority, although, we believe that it will still be open to the plaintiff to sue for the possession of his share of the properties gifted after the lives of the maintenance holders and Art. 126 of the Limitation Act will not stand in his way. According to the plaintiff the father and his wives had at best only a life-interest for their maintenance and any alienation beyond their lives would be void and not require to be set aside.

Dealing with the contention under Art. 127, the learned Judges observe that the article has only to do with the properties if they are joint family properties at the time of suit and not with properties which once were joint family properties but afterwards ceased to be so by virtue of a partition in the family. This proposition is supported by the decisions referred to by the learned Judges. We do not, however, understand the learned Judges to have laid down that if some of the joint family properties are subjected to a partition and some items are left undivided in the possession of maintenance holders, the members of the family must be deemed as a matter of law to have become divided even in respect of the latter properties. Although the presumption of the Hindu law is that a partition is complete both as regards the members of the family and the properties, see *Anandibai* v. *Hari Suba Pai*[1] and *Vaidyanatha Aiyar* v. *Aiyaswamy Aiyar*[2], it is rebuttable and it is possible that though with regard to some of the properties, the joint family status may be disrupted, it may still remain with regard to the others. This was clearly brought out in the recent decision of the Privy Council in *Konammal* v. *Annadana*[3], where their Lordships held that though the members divided the partible properties, the impartible estate continued to be joint family property with its incident of survivorship.

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1. (1911) I.L.R. 35 Bom. 293.
2. (1908) I.L.R. 32 Mad. 191: 19 M.L.J. 94 (F.B.).
3. (1927) L.R. 54 I.A. 114: I.L.R. 51 M. 189 at 204, 205: 54 M.L.J. 504 (P.C.).

THE CROWN *v.* SUKH DEV, I.L.R. 11 Lah. 220.

An admittedly novel application by the Crown to force a counsel on an accused without his consent and against his wishes, so as to represent him during his absence from Court was rightly rejected by their Lordships as opposed to law. The difficulties in the way of the Crown in proceeding with a trial where one of the accused is unable to be present owing to illness caused by a voluntary act, such as a hunger-strike, are no doubt unprovided for by the Code of Criminal Procedure as it exists but that is no reason why the power applied for by the application should be upheld as existing in the Courts. As pointed out by Shadi Lal, J., even S. 561-A which provides for the inherent jurisdiction of the Court cannot be invoked for the purpose of doing an act which would conflict with any of the provisions of the law or the general principles of criminal jurisprudence. Nor is there anything in the English practice to justify such a procedure. The decision in *Reg* v. *Yscuado*[1] is indeed an authority to the contrary. It may be re-called that a bill was introduced to provide for such a situation but so far the Legislature has not been persuaded to accept it. The decision is noteworthy as one more landmark, in the judiciary vigilantly resisting the claims of the executive to encroach upon the liberty of the subject except under due process of law.

KOI SAHU *v.* ATUL KRISHNA GHOSH, I.L.R. 9 Pat. 118.

The point discussed in this case is one that arises fairly often, viz., whether a puisne mortgagee or a purchaser of the equity of redemption impleaded as a party in a mortgagee's action is bound to set up any mortgage right of his in priority to the plaintiff's mortgage, on pain of being barred if he fails to do so by the rule of constructive *res judicata* from enforcing his rights in a later action. The two Privy Council decisions that lay down the rule on this question are those in *Sri Gopal* v. *Pirthi Singh*[2] and in *Radha Kishun* v. *Khurshed Hossein*.[3] It is only when the pleadings properly raise the question of the priority of the respective mortgages that a party properly added as having a right to redeem the plaint mortgage is called upon to set up a paramount claim of a superior right. Where the plaint does not clearly and explicitly deny the prior rights of the defendant, it is not incumbent on the latter to put in issue his rights as prior mortgagee.

1. (1854) 6 Cox Cr. Cases 386.
2. (1902) L.R. 29 I.A. 118: I.L.R. 24 A. 429 (P.C.).
3. (1919) L.R. 47 I.A. 11: I.L.R. 47 C. 662: 38 M.L.J. 424 (P.C.).

While it is true that the application of the rule of *res judicata* by the Courts in India should not be influenced by technical considerations of form but by matter of substance (*Sheoparsan Singh* v. *Ramnandan Prasad*[4] and *Kalipada De* v. *Dwijapada Das*[5]) it must be remembered that this is subject to the safeguard that the liberal application of the rule is only to be "within the limits allowed by law." In matters of constructive *res judicata* under Explanation IV to S. 11, Civil Procedure Code, it is for the party who relies on it to prove strictly the necessary elements for the application of the rule. The question raised in the judgment under notice is discussed even more fully and clearly in a later judgment of the Patna Court itself in *Sadu Behera* v. *Dibakar Tarai.*[6] Das, J., after discussing the question both on principle and authority has formulated the rules in a series of propositions which may be taken as setting out concisely the general effect of the authorities on the point.

KING-EMPEROR *v.* RAM TAHAL SINGH, I.L.R. 9 Pat. 169.

The construction of the rule that found favour with the Court in this case is not the only one that is possible. There is very much to be said in favour of the opposite view. A licensed motor vehicle which the rules prohibit from carrying more than four passengers was allowed to carry five friends of the owner gratuitously and not for hire in the public highway. The judgment holds that an offence has been committed inasmuch as the restriction was held to be operative not only when the vehicle is actually plying for hire but also during the entire period for which the license was granted. In other words it was held that it was not open to the owner of the motor vehicle during the time for which the permit was granted to free that vehicle from the conditions of the permit. Reliance was placed upon the decision in *Hawkins* v. *Edwards,*[7] but the case is not exactly similar and it may be permissible to doubt the correctness of that decision itself. It is difficult to see why the owner should be deprived of the use of his vehicle on other occasions when it is not plying for hire like any other owner unless the language of the rule is clear. The recent decision of the Bombay Court in *Ganesh Ramchandra Rajwade* v. *Emperor*[8] supports this view.

4. (1916) L.R. 43 I.A. 91 at 98: I.L.R. 43 C. 694: 31 M.L.J. 77 (P.C.).
5. (1929) L.R. 57 I.A. 24: 58 M.L.J. 171 at 175 (P.C.).
6. (1929) I.L.R. 9 Pat. 539.
7. (1901) 2 K.B. 169.
8. A.I.R. 1930 Bom. 161.

FIRM OF MOHAN LAL HARDEO DAS *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA, I.L.R. 9 Pat. 172.

An application under S. 66, cl. (2) of the Income-tax Act has to be made within one month of "the passing of an order" under S. 31 or 32 of the Act. It was held in this decision that the application should be made within thirty days of the actual date of the recording of the order by the officer irrespective of the question whether the order was pronounced after notice to the parties or when it was communicated if no date was fixed for the passing of the order. We think the conclusion is not correct. There is no discussion of the authorities bearing on the question in the judgment under notice but it is said the language is plain and the literal meaning should be given to the actual language without any reference to question of hardship. The attention of the learned Judges, it would appear, has not been drawn to decisions of other Courts on analogous provisions of other Acts as to when an order is "made" or "passed." It has been held in Madras and Bombay that there can be no valid order unless it is made after notice to the parties affected by it or it is communicated to them in the absence of such notice. As observed by Mr. Justice Venkatasubba Rao in a recent decision in *Swaminatha* v. *Lakshmanan Chettiar*[1] the very word "order" by necessary implication, means in law that the party affected has had reasonable notice of it. The same principles had been laid in earlier cases to none of which reference is made in the judgment: *Annamalai Chetti* v. *Cloete*,[2] *Seshama* v. *Sankara*,[3] *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu*[4] and *Abdul Ali* v. *Mirja Khan*.[5] There is a full discussion of the question in *Swaminatha* v. *Lakshmanan Chettiar*[1] referred to above. Where no notice of the day fixed for making the order is given to the parties, the order can be deemed to be made only when it is communicated to the parties affected by it or, if they prevented its communication to them wilfully or otherwise, when it would have been communicated to them in the usual course.

The second question raised and decided in this case is whether the time taken for obtaining copies of an order under S. 66, cl. (2), refusing to make a reference to the High Court can be excluded in calculating the period of six months within which the application to the High Court should be made under S. 66;

1. (1929) I.L.R. 53 M. 491.
2. (1883) I.L.R. 6 M. 189.
3. (1888) I.L.R. 12 M. 1.
4. (1910) I.L.R. 34 M. 151.
5. (1903) I.L.R. 28 B. 8.

cl. (3). The learned Judges hold that S. 12 of the Limitation Act will, by virtue of the amended S. 29 of the Limitation Act (IX of 1908), apply to such applications and the time can be excluded. The difficulty, however, consists in applying the language of S. 12, cl. (2) as it applies only to cases of appeals, applications for leave to appeal and applications for review. The judgment under notice, while appreciating the difficulty, proceeds to hold that S. 29 should be liberally construed and their Lordships hold that the time taken in obtaining copies can be deducted. This conclusion, however, does not seem to be correct as there is no warrant in enlarging the scope of S. 12 to cases which do not come within its ambit. Nor is there any real hardship as the period of six months provided for in S. 66, cl. (3) is sufficiently long to enable the affected party to obtain all the necessary papers to satisfy himself as to the necessity of an application. The reference in S. 29 of the Limitation Act to applications under special or local law does not justify the inference drawn by the Court that S. 12 was intended to be applicable to all cases of applications under special or local law. Applications are mentioned in S. 29 merely because some of the sections of the Limitation Act which are made applicable other than S. 12 itself, are made to apply and also because some kinds of applications also can get the benefit of the deduction of time allowed by S. 12 of the Act.

NIRMAN BAHADUR *v.* FATEH BAHADUR, I.L.R. 52 All. 178.

The judgment of Mr. Justice Mukerji in this case would seem to go too far in saying that because the compromise with the widow proceeded on the footing that the deceased husband was undivided with the rest, the compromise must necessarily not be binding on the reversioner because then *ex concesso,* there is no widow's estate and no reversioner. If the compromise, for instance, simply recorded that the husband died undivided, and the widow is given maintenance, then obviously, the reversionary estate would get nothing by the compromise and the compromise would fail for that reason. It wipes out the reversionary estate for no consideration whatever. Then it might rightly be said that the reversionary estate is completely extinguished. Cf. *Amrit Narayan Singh* v. *Gaya Singh*[1]. The same would be the case if the widow got something absolutely. One condition laid down by the Privy Council in *Ramsumran Prasad* v. *Shyam Kumari*[2] is that the compromise must be for the benefit of the estate and not merely for the personal advantage of the limited owner. Their Lordships' observations in the same case with reference to *Imrit Kunwar* v. *Roop Narain Singh*[3] have a bearing on this question. Their Lordships say "in a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have titles after her, the widow gave up her daughters' rights in consideration of her own remaining practically unimpaired. Such a compromise could obviously not stand; indeed it is not a compromise at all." But the estate of the husband might consist of this property and other property his self-acquisition. The litigation might be disastrous to her other estate. She might find the compromise really beneficial to her other estate, that is to say, including the reversionary estate. In certain circumstances, exonerating the estate from liability from costs in itself might be a benefit conferred on the estate sufficient to justify the compromise. If the compromise proceeds as it should proceed, if it is a true compromise "on the assumption that there was an antecedent title of some kind in the parties," the agreement acknowledging and defining what that title is, the compromise cannot be characterised as wiping out the reversionary estate merely be-

1. (1917) L.R. 45 I.A. 35: I.L.R. 45 C. 590: 34 M.L.J. 298 (P.C.).
2. (1922) L.R. 49 I.A. 342: I.L.R. 1 Pat. 741: 44 M.L.J. 751 (P.C.).
3. (1880) 6 C.L.R. 76.

cause it acknowledges the title of the members of the family in a portion of the subject-matter of the litigation on the assumption that the family is undivided. The whole question is, we should think, "Did she represent the estate or did she merely act for her own advantage?" What she got as a result of the compromise and for whom is a very important factor in the proper determination of this question. What title she acknowledged in the other side might have a material bearing on this question. But if she acted on behalf of the estate and got some benefit for it—what title exactly she acknowledged in the other side would not seem to be material. A further question that arose in the case was one of limitation. More than six years had elapsed from the date of the compromise. The suit was by the daughter and daughter's son. The daughter's suit was apparently barred; the question was whether the daughter's son's would be barred. It is difficult to appreciate the distinction on principle between a case like the present and a case of alienation. No doubt Art. 125 starts limitation from the date of alienation, while Art. 120 makes it start on the accruing of the cause of action. But the ratio of the Full Bench decisions in *Varamma* v. *Gopaladasayya*[4] and *Kesho Prasad Singh* v. *Sheo Pargash Ojha*[5] on Art. 125 is that there is only one cause of action for the whole body and the action brought is a representative action. That principle is equally applicable to suits brought to declare compromise decrees not binding.

MUHAMMAD SHAFI *v.* MUHAMMAD SAID, I.L.R. 52 All. 248.

The statement of the rule as to estoppel in this case may be correct enough with reference to the facts of the case but its accuracy may be doubted if applied to all cases coming within section 115. That section, it must be borne in mind, covers a number of situations, as the section itself indicates, five of them:

(1) that caused by declaration,
(2) that caused by act,
(3) that caused by omission,
(4) that causing a belief that a thing is true, and
(5) that permitting a belief that a thing is true.

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4. (1918) I.L.R. 41 M. 659: 35 M.L.J. 57 (F.B.).
5. (1921) I.L.R. 44 A. 19 (F.B.).

A feature common to all estoppel is that the other person must have acted upon the belief. If a person knows the truth, it is of course impossible to say, whatever the circumstances under which the estoppel is claimed to arise, that he acted upon the belief of the truth of the representation (*Mohori Bibee* v. *Dharmodas Ghose*[1]).

But the proposition stated in the case is that "the party relying must show that it was not reasonably possible for him to know the true state of affairs by pursuing inquiries reasonably and with diligence. Where truth is accessible to a party the plea of estoppel upon representation fails." That is far wider. In *Carr* v. *London and North Western Railway Company*[2] Brett, J., as he then was, states the rule as four different propositions.

(I) If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such state of things and acts upon his belief he who knowingly made the false statement is estopped from avowing afterwards that such a state of things.

(II) If a person either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts the just is estopped from denying the existence of such a state of facts.

(III) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter has intended to act upon it in a particular way and he with such belief does act in that way to his damage the first is estopped from denying that the facts were as represented.

(IV) If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice the second cannot be heard afterwards, as against the

1. (1902) L.R. 30 I.A. 114: I.L.R. 30 C. 539 (P.C.).
2. (1875) L.R. 10 C.P. 307.

first, to show that the state of facts referred to did not exist. As regards the third of the propositions, in the particular case, his Lordship held that the plaintiff's servants could not be taken to have been misled as they failed to act with reasonable care and attention. The meaning of that is if even on the representations made, any man acting reasonably would not have acted in the particular manner, there is no estoppel. The fact that the plaintiff acted is not sufficient. The representation must be such that a man acting with reasonable care would have so acted. That does not go anything near the proposition as stated. As regards the last case, the very reference to negligence as proximate cause ("real" as some other case would call it) leads to the further inference—that where the particular result would not have followed if the plaintiff had acted with due diligence—the negligence of the defendant cannot be said to be the proximate cause and the plaintiff must fail. As regards the law of contract, the rule laid down by the Contract Act in the case of fraud and misrepresentation is—that if the particular representation did not cause the consent, the contract is good notwithstanding. In the case of fraudulent misrepresentation, if the consent was caused by it the contract is vitiated. If, on the other hand, the consent is caused only by innocent misrepresentation or by silence amounting to fraud under section 17, then if the other party had the means of discovering the truth with ordinary diligence the contract is not affected. If that principle is to be applied to estoppel, in the first of the cases referred to by Mr. Justice Brett, means of discovery of truth with reasonable diligence is no defence, while in the second case, it would be. In this connection, it may be noticed that in one of the cases really coming under estoppel, *viz.*, section 41 of the Transfer of Property Act, the statute makes express provision that the transferee must have taken "reasonable care to ascertain that the transferor had power to make the transfer and also acted in good faith." In connection with section 43, Transfer of Property Act, which is another statutory application of the rule of estoppel enunciated in section 115, Evidence Act, also it has been held that the transferee should allege and prove that he took the transfer believing in good faith and after one enquiry though the authorities cited do not go so far. (*Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib.*[3])

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3. (1914) 28 M.L.J. 44.

The ordinary rule as to misrepresentation is thus stated by Baggallay, L.J., in *Redgrave* v. *Hurd*[4]. "The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me, and gone further.' The representation once made relieves the party from an investigation, even if opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion, which might put a person upon enquiry, and make it his duty to inquire, but under ordinary circumstances, the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground." These observations were made with reference to false misrepresentation in connection with a contract which was said to vitiate the contract. But there is no reason why a different rule should apply to estoppels. As between fraudulent misrepresentation and innocent misrepresentation, this difference there is as noted by Kay, L.J., in *Low* v. *Bouverie*[5]. "If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence; but where no fraud is alleged, it is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it."

The authorities do not seem to justify the broad statement extracted above; the failure to inquire only in certain circumstances would prevent the estoppel from arising. In the case itself, the admission of title was equivocal and uncertain and the various documents of which the person relying upon estoppel had notice gave varying descriptions which must have put him upon notice and failure to inquire was legitimately taken as leading to the inference that he did not act upon it.

EMPEROR *v.* KANWER SEN, I.L.R. 52 A. 263 (F.B.).

The cases where costs have been allowed against the Crown were thus classified by their Lordships in *Johnson* v. *The King*[6].

(1) Where the Crown is treated as an ordinary litigant under the authority of local statutes as is generally the case in self-governing Colonies.

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4. (1881) 20 Ch. D. 1 at 23.
5. (1891) 3 Ch. 82 at 113.
6. (1904) A.C. 817.

(2) Where the question arose under a petition of right or some proceedings analogous to a petition of right.

(3) Exceptional cases where justice seemed to require that the Crown should pay costs or where the Crown was not unwilling to be treated as a litigant.

Their Lordships finally laid down the rule that the Crown neither pays nor receives costs unless the case is governed by a local statute or there are exceptional circumstances justifying a departure from the ordinary rule. As the subject of costs is provided in the Criminal Procedure Code, there is no scope for resort to the reserve of power indicated in the last few words. (See *Sankaralinga Mudaliar* v. *Narayana Mudaliar*[1].) The only question is whether section 526 provides for payment of costs to the Crown. It was obviously intended for the purpose and the only question is whether the language is apt for the purpose. The question argued was whether the Local Government is a person opposing the application. The section does not speak at all of the Local Government but only of the Public Prosecutor and costs apparently are to be directed to be paid to the Public Prosecutor. Unless the Court directs notice to the Local Government it is difficult to see where the Local Government as such comes in. The question is considered and the Local Government is held to be a person within the meaning of section 526.

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1. (1922) I.L.R. 45 M. 913: 43 M.L.J. 369 (F.B.).

RAJA OF RAMNAD v. MANGALAM, I.L.R. 53 M. 597: 59 M.L.J. 289 (P.C.).

The judgment is very meagre. It affirms the decision of the Madras High Court in *Arunachallam Chettiar* v. *Mangalam*.[1] In it, their Lordships approve of the decisions in Madras that have held that a custom exempting the tenant from liability from rent when he leaves the land fallow is provable and is not inconsistent with section 4 of the Madras Estates Land Act. Their Lordships had not to consider the exact scope of this custom but they do not seem to see any objection to a custom excusing the tenant from payment even though the tenant does not choose to cultivate out of mere caprice or negligence. That question has been the subject of numerous decisions here. Their Lordships had not to consider them.

Their Lordships also approve of the decision of the High Court that if the tenant cultivates wet land with dry crops when there is sufficient water for wet crops, he is liable for wet *sarasari*, but if he does so for want of water, then he is not liable for wet *sarasari*, but only for dry rates. Whether it is waram of the dry crop or the cash dry rate, for which he is liable, their Lordships do not decide for want of materials. The landlord is not entitled, their Lordships also hold to have experimental harvesting, that is to say, to harvest a portion himself and charge the tenant for the whole on the basis of the harvest of the portion.

NARAYANASWAMI AIYAR v. RAMA AIYAR, I.L.R. 53 M. 692 (P.C.).

In this case their Lordships affirm the judgment of the Madras High Court in *Rama Aiyar* v. *Narayanaswami Aiyar*,[2] but on the short ground that there cannot be a valid surrender by a widow in favour of the nearest male reversioners (here the daughter's sons) without the consent of the intermediate female reversioner (the daughter). Their Lordships leave the question whether the consent of the daughters would have validated the surrender open.

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1. (1915) I.L.R. 40 M. 640: 31 M.L.J. 168.

2. (1925) 51 M.L.J. 313.

GANESHI LAL *v.* CHARAN SINGH, L.R. 57 I.A. 189: I.L.R. 52 All. 358: 59 M.L.J. 177 (P.C.).

Here the question was as to the right of contribution under S. 82 of the Transfer of Property Act. There were two sets of properties *K* and *M* both under mortgage. *K* was sold to *S* reserving a portion of the purchase money for the discharge of the mortgage. Property *M* was subsequently sold in execution of a decree subject to the mortgage and purchased by *A*. Property *K* was sold in execution of another decree and purchased by *B* subject again to the mortgage and the purchaser subsequently transferred his interest to *S*. *S* then paid the mortgagee and brought a suit for contribution against *A*. *A* contended that as plaintiff was bound under his contract to pay up the mortgage he could not claim contribution. Their Lordships held agreeing with the High Court that S. 82 applied and the defendant was not party to the contract and he being a purchaser subject to the mortgage the benefit of the contract had not also passed to him in law or in equity. Their Lordships do not consider in what cases the benefit of the contract would in the absence of a specific assignment of the right, pass to the subsequent purchaser, whether for instance if he purchased free of incumbrances it would pass.

MT. NAWASI BEGAM *v.* MT. DILAFROZ BEGAM, L.R. 57 I.A. 181: I.L.R. 52 All. 272: 59 M.L.J. 262 (P.C.).

The plaintiff's predecessor-in-title had sued as the heir of a deceased Muhammadan for his share of the properties and had got a decree first subject to payment of the defendant's dower, but having failed to make the payment, did not recover possession but now sued to recover the share unconditionally on the ground that the widow had been fully paid up out of the usufruct. The suit had been made possible by *Maina Bibi* v. *Chaudhri Vakil Ahmad*,[1] where in similar circumstances the suit was held not barred by *res judicata* and maintainable. The point in this case was the further point whether the widow could set up a claim to interest which she did not set up in the previous litigation. Their Lordships held agreeing with the High Court that the claim might and ought to have been set up in the previous suit and was consequently barred. Similar questions have arisen in connection with mortgage suits when the

1. (1924) L.R. 52 I.A. 145: I.L.R. 47 All. 250: 48 M.L.J. 667 (P.C.).

view prevailed that a second suit for redemption lay as to the binding nature of the conclusions of the previous suit as to the terms on which redemption could be had and have been similarly decided. The right on which the defendant held and the extent of such right having been already determined, provided a second suit lay, it was inevitable that the Court should hold that the conclusion should be binding in the subsequent suit. The previous suit had been decreed and not dismissed so that there was no impediment to the Court holding the conclusion *res judicata*. In *Mt. Maina Bibi* v. *Chaudhri Vakil Ahmad*,[1] the previous suit had been dismissed but the dismissal was on the ground of non-compliance with the conditions imposed by the decree, *viz.*, payment of the amount found due within six months. Even so their Lordships held that the conclusion in the previous suit as to the precise nature of the defendant's holding and her rights in connection with it were *res judicata*.

SUBBU CHETTY *v.* ARUNACHALAM CHETTIAR, I.L.R. 53 M. 270: 58 M.L.J. 420 (F.B.).

This is a very remarkable illustration of how some obiter of the Privy Council becomes the starting point for a whole mass of case-law in reversal of the previous consensus of authority which on a fuller examination or in the light of the later rulings of that august body itself is found to be not justified. One cannot help very much wishing that Courts resisted the temptation as the Bombay High Court usually does of giving effect to such obiters. Such obiter of Lord Macnaughton in the course of the hearing in *Khwaja Muhammad Khan* v. *Husaini Begam*,[2] led Sir Lawrence Jenkins and Mr. Justice Mookherjee in *Debnarayan Dutt* v. *Chunilal Ghose*[3] to take a liberal view as to the right of strangers to the contract to sue to enforce it on the ground that it was for their benefit and thereafter there was a perfect tangle of case-law some in favour and some against that position. The whole question was re-examined in this case and the law has been put on the footing on which it was before the new current started. It is laid down in this case that as a rule a stranger to a contract cannot sue except (*i*) where the promisee is a trustee for the plaintiff, (*ii*) where there is a charge in favour of the plaintiff, (*iii*)

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1. (1924) L.R. 52 I.A. 145: I.L.R. 47 All. 250: 48 M.L.J. 667 (P.C.).
2. (1910) L.R. 37 I.A. 152: I.L.R. 32 All. 410: 20 M.L.J. 614 (P.C.).
3. (1913) I.L.R. 41 C. 137.

where the contract is a term in a marriage settlement or a family arrangement, and (*iv*) or lastly where the promisee enters into relations with the third party or is estopped from denying his right.

SAHU RADHAKRISHNA *v.* TEJ SAROOP, I.L.R. 52 All. 363 (F.B.).

This case is yet another illustration of what we have remarked when dealing with *Subbu Chetty* v. *Arunachalam Chettiar*[1]. A remark of the Privy Council in *Ganesh Lal Pandit* v. *Khetramohan Mahapatra*[2] has necessitated two references to the Full Bench one in Madras, *Ratnasabapathy Chettiar* v. *Devasigamony Pillai*[3], another in Allahabad, the case under review.

It is held in both these cases that the Article of Limitation applicable to a suit to enforce the personal covenant in a registered mortgage is the six years' rule Art. 116 and not the three years' rule.

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1. (1929) I.L.R. 53 M. 270: 58 M.L.J. 420 (F.B.).
2. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).
3. (1928) I.L.R. 52 M. 105: 56 M.L.J. 10 (F.B.).

GOPICHAND v. THE CROWN, I.L.R. 11 Lah. 460.

R. Krishnasawmy Aiyangar, Advocate, Cuddalore, writes:—

The decision in *Gopichand* v. *The Crown*[1] is one of considerable importance to the legal profession. Their Lordships clearly lay down for the guidance of the practitioners and the Courts how the provisions of S. 162 of the Code of Criminal Procedure and S. 145 of the Indian Evidence Act have to be applied when circumstances warranting their application crop up during enquiry or trial before Courts. I have come across several instances where the rule is not correctly observed by Judges and lawyers. The case on hand is a flagrant instance of the kind.

The Code provides that statements made by a witness before the investigating officer can be used for the purpose of contradicting him in the manner provided by S. 145 of the Indian Evidence Act. If it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be so used.

After getting a particular answer, ask the witness first whether he made such and such statement before the police officer. If he says yes, good. If he denies or states that he does not remember, put to the witness the relevant portion of the record which is alleged to be contrary to his statement in Court and thus give him an opportunity to reconcile the same, if he can. It is only then that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner permitted by law.

The policy of the law thus enumerated can best subserve the intention in practice if the investigating officer is examined last and not as the first witness as is not unoften done by prosecutors. The opportunity of proving specific previous statements denied by the witness is lost unless the Court permits the officer to be recalled. Of course, if the officer is not called by the prosecution, the only remedy is to get him called as a Court witness or summon him for the defence, either of which causes will considerably handicap the defence.

Failure of justice will be avoided if two things are accomplished: (1) Strict adherence to the provisions of the two

1. (1930) I.L.R. 11 Lah. 460.

sections mentioned above by putting questions in a suitable form and marking the portions as exhibits. (2) The Crown examining the investigating officer as the last witness to enable the policy of the law to be worked out.

[In the above case, the prosecution witnesses were cross-examined by the counsel for the accused as to the statements made by them in writing before the Head Constable during the investigation and also before the committing magistrate. To some questions the witnesses stated either that they did not make the statements or that they did not remember having made them. The cross-examiner left the witnesses at that without putting to them the specific portions of the statements by which he intended to contradict them but instead put to the investigating officer, when he appeared as a witness, the question whether those statements were made by the witnesses. The case under notice points out that under S. 145 of the Evidence Act, the witness's attention must be specifically drawn to the alleged contradiction before it can be used against him and that S. 155, cl. (3) does not make the proof through the investigating officer sufficient to let it in for the purpose of contradiction.—ED.]

J. M. CASEY *v.* COMMISSIONER OF INCOME-TAX, I.L.R. 9 Pat. 185.

The facts of the case were peculiar and their Lordships rightly held that the income was "agricultural income" as defined by S. (2) (1) (*b*) of the Income-tax Act and hence exempt from tax. The mere use of machinery does not by itself suffice to convert every process employed as an industrial process. Even for purposes of agriculture and as incident to agricultural processes, machinery may have use and scope for operation. The decision in *Killing Valley Tea Company, Ltd.* v. *Secretary of State for India in Council*[1] was rightly distinguished on the findings of fact.

ATUL KRISHNA GHOSH *v.* BRINDABAN NAIK, I.L.R. 9 Pat. 306.

The soundness of this decision is open to doubt. A previous order directing execution to proceed based upon an express or implied adjudication that the execution petition is not barred

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1. (1920) I.L.R. 48 C. 161.

by limitation is none the less binding on the parties as *res judicata* whether in a later and fresh execution petition or in later stages of the same execution petition still pending. The distinction sought to be drawn as to the order being *res judicata* only in a new petition subsequently filed and not in the course of the same petition in later proceedings is unsound and really against authority. The decision in *Mungul Pershad* v. *Grija Kant Lahiri*[2] and *Rajah of Ramnad* v. *Velusami Thevar*[3] are direct authorities and cannot be distinguished merely on the ground that the question of *res judicata* arose only later on in a new proceeding. In *Ram Kirpal* v. *Rup Kuari*[4] it is pointed out by Sir Barnes Peacock that "the binding force of such a judgment (or order) does not depend upon S. 13 of Act X of 1877 but upon general principle of law." In fact, the facts in the case show that it was in a later stage of the same execution proceeding that their Lordships hold the previous order was *res judicata*. Their Lordships point out at page 275 that the application for execution upon which the previous order was pronounced was not dismissed or finally disposed off. Any doubt on this point is set at rest by the principle of the decision of the Privy Council in *Hook* v. *Administrator-General of Bengal*[5]. No reference is made in this judgment under review to either of the two Privy Council decisions. The earlier decision of the Patna Court in *Maharajah Kisho Prasad Singh Bahadur* v. *Harbans Lal*[6] was decided before the last Privy Council decision referred to. The decision in the case leads to an obvious anomaly for which there is no justification either in principle or authority.

MEHRBAN KHAN *v.* MAKHNA, I.L.R. 11 Lah. 251: 58 M.L.J. 714 (P.C.).

Provisions in a mortgage-deed which are a clog on the equity of redemption are totally void not only against the mortgagor alone but also against assigns from him. They are, as pointed out by Lord Tomlin, provisions which, when forming part of the actual mortgage contract, have under the general law no validity at all. The decisions in *Rahmat Ali* v. *Shadi*

2. (1881) L.R. 8 I.A. 123: I.L.R. 8 C. 51 (P.C.).
3. (1920) L.R. 48 I.A. 45: 40 M.L.J. 197 (P.C.).
4. (1883) L.R. 11 I.A. 37: I.L.R. 6 A. 269 (P.C.).
5. (1921) L.R. 48 I.A. 187: I.L.R. 48 C. 499: 40 M.L.J. 423 (P.C.).
6. 1920 P.H.C.C. 109.

Ram[7] and *Aziz Khan* v. *Duni Chand*[8] are impliedly overruled as being opposed to principle. The present decision is a direct authority of the highest Court that even against assigns such provisions have no more binding force than they have against the mortgagor personally.

MUNICIPAL COMMITTEE, DELHI *v.* MST. CHAMBELI, I.L.R. 11 Lah. 276.

Permission was granted by a Municipality to the construction of a building but nevertheless subject to certain conditions which were tacked on. It was held that the conditions were *ultra vires*, as no rules had been made as contemplated by the Act. In such a case the conditions were held to be not binding and they were allowed to be disregarded as non-existing and the permission granted was treated as an absolute permission. The learned Judges observe that the municipality can either grant or refuse permission absolutely but cannot add conditions which are not authorised, and that such a conditional permission must be regarded as an absolute permission altogether freed from the invalid conditions. It is a nice question as to whether such a conditional permission should be treated as a refusal except on the conditions being observed or as a permission tried to be fettered by illegal conditions. In the particular case the order was construed as coming under the latter category. The question will mainly depend upon the form of the particular order and the true scope of the enactment under which it is passed.

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7. (1923) 75 I.C. 877.

8. (1913) 20 I.C. 812.

SUBHAN MOCHI *v.* BABU RAM SINGH, I.L.R. 52 All. 329.

In *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[1] Lord Buckmaster, considering the scope of S. 109, cl. (c), Civil Procedure Code, says, "it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions as, for example, those relating to religious rites and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance". The case under review involved the right of the Muhammadans to take procession and it was held to be a question of great public importance to the Muhammadan community and so leave was granted under that clause.

NANNU MAL *v.* RAM CHARAN LAL, I.L.R. 52 All. 331.

The question involved in this case is one on which there has been considerable divergence of opinion. The question is this: a first mortgagee brings a suit on his mortgage without impleading the second mortgagee, obtains a decree, sells the property, purchases it himself and gets into possession. The second mortgagee then brings a suit to redeem the first mortgage. What are the terms on which he is to redeem the first mortgagee—is it to be on the footing of the mortgage or that of the decree. Is possession to affect the interest he should get? On principle it would seem that when the second mortgagee repudiates the previous proceedings he cannot take advantage of them for the purpose of cutting down interest. This was the view taken by the Privy Council in *Umes Chunder Sircar* v. *Zahoor Fatima*[2]. But once he takes possession, the position becomes a bit complicated. If he wants interest, he can claim that only in the capacity of mortgagee. Then he is bound to account for the profits. In *Umes Chunder Sircar* v. *Zahoor Fatima*[2] the Privy Council disallowed interest as it was not shown that it was less than the interest. The Calcutta Courts have been taking the view that the prior mortgagee having taken the decree, in other words having elected to take the smaller interest could not claim the higher interest. As pointed out in *Thenappa Chettiar* v. *Marimuthu Nadan*[3] this

1. (1920) L.R. 48 I.A. 31: I.L.R. 44 M. 293: 40 M.L.J. 229 (P.C.).
2. (1890) L.R. 17 I.A. 201: I.L.R. 18 C. 164 (P.C.).
3. (1908) I.L.R. 31 M. 258 at 260: 18 M.L.J. 344.

view can possibly be justified only when he had notice of the subsequent mortgage and yet did not choose to make the mortgagee a party. When he was not aware of the subsequent mortgage the principle cannot apply. But as the Privy Council point out, it being the duty of the mortgagee to find out the mortgages on the register, his failure to do so is to put him on notice (*Tilakdhari Lal* v. *Khedan Lal*[4]). If so, in all cases, it might follow that the prior mortgagee is not entitled to the rate of interest provided in the mortgage. It cannot be that. If the mortgagee agrees with the mortgagor to take a lower rate of interest, undoubtedly the benefit of such agreement would go to the second mortgagee also though he is not a party to the agreement. The same rule would apply, it has been held, to the case of a sale to the mortgagee, who takes possession of the property and enjoys the profits. (*Syed Ibrahim Sahib* v. *Arumugathayee*[5].) He must be content with the profits the sale gives him. Even if the profits came to more, the second mortgagee could not complain for he would not have been entitled to claim the profits if the mortgagee parted with them in favour of an utter stranger. The reduction of interest by reason of the decree is not on the same footing as reduction of interest as a result of an agreement between the mortgagor and the previous mortgagee. In the absence of any such agreement, the true position would seem to be that the mortgagee, who has taken possession of the property is bound, if he so chooses, to account for the profits at the same time being entitled to the interest provided in his document. Mr. Justice Mukerjee puts the position thus (*Satnarain Tewari* v. *Chowdhuri Sheobaran Singh*[6]): "No doubt, the defendants are entitled to be subrogated to the rights of the prior encumbrancers and thus to claim interest on the foot of the mortgages they have discharged; but they cannot be justly allowed at the same time to retain the profits of properties. It is only their mortgagee-character which can support their claim for interest, and it is only the status of full owners that can justify the enjoyment of profits by them. They cannot simultaneously enforce their rights in both capacities." Applying the same argument, when a second mortgagee repudiates the binding nature of the first mortgagee's sale, it is not open to him, it may fairly be contended, to repudiate the sale and at the same time claim the benefit of the reduction of interest effected by the decree.

4. (1920) L.R. 47 I.A. 239: I.L.R. 48 C. 1: 39 M.L.J. 243 (P.C.).
5. (1912) I.L.R. 38 M. 18. 6. (1911) 14 C.L.J. 500 at 506.

M. B. SINGH & CO. *v.* SIRCAR & CO., I.L.R. 52 All. 459.

Three questions arose in this case: Is payment by a cheque payment within the meaning of section 20, Limitation Act? Secondly, is it necessary that it should appear in writing that the payment is towards principal? Thirdly, is the cheque a sufficient compliance with the requirement as to writing imposed by the section? A cheque may be taken in payment or it may be taken as payment only on realisation. In the former case, their Lordships would say it would be payment within the meaning of section 20 and the cheque would also satisfy the requirement of writing under section 20. It is much easier to regard an endorsement as payment without violence to the language of the section than a cheque—the more so when the endorsement purports to be in payment towards the debt. The section does not require that the writing should state that the payment is in part payment. All that it requires is that the payment should appear in writing. That the payment is part payment can be shown *aliunde*. *Mackenzie* v. *Thiruvengadatham*[1] takes a different view on both these questions and it is approved on the latter point in *Manickam Pillai* v. *Ratnasami Nadar*[2]. We must confess we prefer the view taken in this case which has the support of *Kedar Nath Mitra* v. *Dinabhandhu Saha*[3] and *Curlender* v. *Abdul Hamid*.[4]

TIKA RAM *v.* MOTI LAL, I.L.R. 52 All. 464.

The question in this case was as to whether a recital in a sale-deed as to the ownership of the adjacent land can be used as evidence under section 32, clause (3) and section 13, clause (*b*), Evidence Act. Their Lordships hold that it is admissible under the former section as the statement would be against the proprietary interest of the vendor and that it might also in certain circumstances, *e.g.*, where if the adjacent land formed a part of the land conveyed, in the natural course of things, it would also have been conveyed, come within section 13 (*b*). We should think that it is going too far to say that the statement by *A* that the adjoining land is *B's*, should be regarded as being against his proprietary interest when there is no claim on his part to such proprietary interest and the only question is whether it is *B's*

1. (1886) I.L.R. 9 M. 271.
2. (1917) 33 M.L.J. 684 at 685.
3. (1915) I.L.R. 42 C. 1043.
4. (1920) I.L.R. 43 A. 216.

or C's. If the case involved the question whether it is *A's* or *B's*, or whether it is *A's* or *C's*, it might be used against *A* to show that it did not belong to him because then really it would be against his proprietary interest. Otherwise, any statement which involved the recognition of the title of a stranger to any property (it is difficult to see why one should stop at adjacent land) would be evidence, because it involves the admission that it does not belong to the party making the statement. The Madras High Court has consistently been holding that such recitals in the documents of strangers are not evidence, we think rightly.

NARSI TOKERSEY & CO. *v.* SACHINDRANATH GAJANAN, I.L.R. 54 Bom. 75.

Notwithstanding the circumstance that S. 3 of the Guardian and Wards Act saves the powers of the High Courts in the matter of the appointment of guardians for minors, it is difficult to see how a guardian can be appointed under those powers for the property of a minor who is a member of a Hindu Mitakshara joint family and who has no separate properties of his own. The reason assigned by the Privy Council in *Gharibullah* v. *Khalak Singh*[1] for the absence of power in the court to appoint a guardian under the Minors Act to the property of a minor member of a joint family is that such a minor has no individual property in it and by any such appointment the powers of the manager of the joint family cannot be displaced. The same reasons against the appointment of a guardian would seem to exist even in the case of an appointment by the High Court to the property of a junior member of the joint family. No doubt it has been pointed out in In re *Jagannath Ramji*[2] that under the practice of the Chancery Court, it was not necessary that a minor should have property before a guardian could be appointed to him. But the cases referred to in In re *Spence*[3] and In re *Fynn*[4] are those relating to the custody of a minor and really bear upon the appointment of a guardian for the person of a minor and the argument in one of the cases was that in such a case the only procedure available was a writ of *habeas corpus* which was available only at law and not in Equity and this argument was negatived. It may be noticed in this connection that in this country it has been recognised that a guardian for the person of a minor can be appointed, though he happens to be a junior member of a joint family. *Jambagathachi* v. *Rajamannarswami Nadalwar*.[5] Again, it is not clear that if the manager of a joint family is also appointed guardian of the properties of a minor member, his powers as manager are displaced by such appointment. It must, however, be mentioned that In re *Manilal Hurgovan*[6] which held that a guardian can be appointed for the property of a minor member of a joint family where he has only joint family properties has been followed not only

1. (1903) L.R. 30 I.A. 165: I.L.R. 25 A. 407 (P.C.).
2. (1893) I.L.R. 19 B. 96.
3. (1847) 2 Phil. 247.
4. (1848) 2 De G. & Sm. 457.
5. (1919) 11 L.W. 596.
6. (1900) I.L.R. 25 B. 353.

in the case under notice but also by a single Judge of a Calcutta High Court in *Hari Narain Das* In re.[1]

SHIDDAPPA IRAPPA *v.* REVAPPA SOMAPPA, I.L.R. 54 Bom. 96.

In this case, an infant brought a suit represented by a next friend and was partially successful in the first Court. He preferred an appeal against the decree and when the appeal was pending, the next friend died and no new next friend was appointed but the appeal came on for hearing and was decided in favour of the minor appellant. In the execution taken of the appellate decree by the minor, the objection was taken by the other side that the decree was a nullity for the above reasons; and the learned Judge has held that a suit by a minor without a next friend was only an irregularity and that the defendant waived it as he objected to the rehearing of the appeal subsequently, at the instance of the minor through another next friend.

Quite apart from the question of waiver on which the learned Judge has rested his judgment, it may be pointed out that where a suit is brought by a minor without a next friend and decided, the decision is not liable to attack at the instance of any other party to the suit, but only on the part of the minor. This was decided as early as 1822 in England in *Bird* v. *Pegg*,[2] where an action was brought against an infant not represented by a guardian and the infant appeared by an attorney and was successful and on a writ of error brought to reverse the judgment on the ground that the infant was not represented by a guardian the original judgment in favour of the infant was affirmed. There the distinction was pointed out between cases where the judgment was against the infant without a guardian and cases where judgment was in his favour. This decision was followed in India as early as 1866 in *Mahomed Hatum* v. *Musammat Jumeera Bibee*,[3] which was the case of a minor plaintiff without a next friend. In this view, the appellate decree in the case under notice is not open to attack by the defendant on the ground that the plaintiff minor was not represented by a next friend in appeal, after the original next friend died. These considerations were appa-

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1. (1922) I.L.R. 50 C. 141.
2. (1822) 5 B. & Ald. 418.
3. (1866) 6 W.R. 183.

rently not kept in view in *Maung San Bwin* v. *Maung Nyi by his mother and guardian* ad litem *Pu Ma and one*[1]; and some of the observations in it may, therefore, require reconsideration.

Again, the need for a next friend in the suit of a minor has been rested on the reason that the defendant should have somebody to look to for his costs in the event of his success. Ex parte *Brocklebank,* In re *Brocklebank.*[2] Consequently where a suit is brought by a minor without a next friend, the defendant can apply that the plaint may be taken off the file with his costs to be paid by the pleader of the minor plaintiff or any other person by whom the plaint was presented under Order 32, R. 2 of the Civil Procedure Code. If, however, the defendant does not take advantage of this provision and allows the suit to proceed to judgment, he waives the irregularity, if any, and can no longer object to it, as pointed out in *Kamalakshi* v. *Ramasami Chetti*[3], which followed Ex parte *Brocklebank,* In re *Brocklebank*[2] and which in its turn has been followed in the case under notice.

It may perhaps be added that even if the appellant was an adult and he died pending the appeal and his legal representatives were not brought on the record, if the appeal was decided in favour of the appellant, the decision would not be a nullity and could not be attacked by the unsuccessful respondent in the appeal on that ground. This was laid down in *Vellayan Chetty* v. *Mahalinga Aiyar*[4] which was followed in *Suryanarayana* v. *Joga Rao*[5] after a review of the authorities. The matter would, of course, be different if the appeal was decided against the deceased appellant as no decision could be given against a person without hearing him and the legal representative could, in such a case, treat the decision as a nullity and claim a rehearing of the appeal. On all these grounds, we submit, if we may say so with respect, that the learned Judge in the case under notice could not have come to a different conclusion.

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1. (1925) I.L.R. 3 Rang. 239.
2. (1877) 6 Ch.D. 358.
3. (1895) I.L.R. 19 M. 127.
4. (1914) I.L.R. 39 M. 386: 28 M.L.J. 138.
5. A.I.R. 1930 M. 719.

GOVIND NARAYAN *v.* RANGNATH GOPAL, I.L.R. 54 Bom. 226.

It is perhaps interesting to notice the conflict of decisions on the question whether Art. 116 of the Indian Limitation Act applies only to registration of documents under the Indian Registration Act or includes registration under other enactments as well, such as the registration of the memorandum of association under the Indian Companies Act. The starting point was in *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetti*[1] where Sir John Wallis, C.J., and Seshagiri Aiyar, J., held that it was not restricted to registration under the Indian Registration Act alone but applied to registration under other Acts, such as the Indian Companies Act and the Copyright Act. This view was referred to with approval in *In the matter of the Union Bank, Allahabad, Ltd.*[2] by the Allahabad High Court. Then came the decision of the Madras Full Bench in *Ramaseshayya* v. *Sri Tripurasundari Cotton Press, Bezwada*[3] where Coutts Trotter, C.J., said that Sir John Wallis, C.J., had put "an intolerable strain on the word *registered*" by including under that term registration under the Companies Act. After this was the decision of the Bombay High Court in *Maneklal Mansukhbhai* v. *The Suryapur Mills Co., Ltd.*[4] where Sir Amberson Marten, C.J., doubted whether the wide meaning given to the word by Sir John Wallis, C.J., was correct, while Crump, J., was clear that such wide meaning ought not to be given to the word "registered." Now, we have the decision under notice where Sir Amberson Marten himself prefers the wide meaning given to the word by Sir John Wallis as including registration under the Indian Companies Act as well.

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1. (1918) I.L.R. 42 M. 33: 35 M.L.J. 253.
2. (1925) I.L.R. 47 A. 669.
3. (1925) I.L.R. 49 M. 468: 50 M.L.J. 520 (F.B.).
4. (1927) I.L.R. 52 B. 477.

ABDUL QUADER *v.* WATSON & SONS, LTD., I.L.R. 8 Rang. 236.

It is often very material to know under which of the two types—that covered by *Lee* v. *Butler*[1] or that dealt with in *Helby* v. *Mathews*,[2] a hire purchase agreement falls. In the first case the property in the article passes to the hirer, with all its consequences; in the latter case, no property passes to him and the owner retains full control over his goods. It is the substance of the transaction that has to be looked at to decide the question and the parties cannot "by calling it a hiring or by any mere juggling with words, escape from the consequences of the contract into which they entered". In England, the distinction between these two cases has now been well recognised but as the system is yet in its infancy in this country, the contracts are often loosely expressed with the result that the contrary of what was intended by the parties is often contained in the document. (See *Cole* v. *Nanalal Morarji*[3].) The distinction between the two cases is clearly stated by Anantakrishna Aiyar, J., in *Auto Supply Co., Ltd.* v. *Raghunatha Chetty*.[4] It is only the contracts in the form of *Helby* v. *Mathews*[2] that are technically called Hire-purchase Agreements.

The case under notice proceeds on the basis that the contract fell within the principle of *Helby* v. *Mathews*[2] and that there was no sale but only a hire of the lorry and an incomplete agreement to purchase. The main question was if the "seizure clause" in the contract by which the owner was empowered to seize the lorry on default being committed in payment of any instalments and to retain the money already paid for its hire, was or was not a penalty within the meaning of S. 74 of the Contract Act. Cunliffe, J., holds that it is not a penalty. The very question was raised in *Singer Manufacturing Co.* v. *Raja Prosad*[5] where it was held following *Manian Pattar* v. *The Madras Railway Co*[6] that the provision for the forfeiture of the advance was not in the nature of a penalty. (See also *Mathura Nath Choudhury* v. *Sreejukta Bageswari Rani*[7].) In *Auto Supply Co., Ltd.* v. *Raghunatha Chetty*[4] the nature of the

1. (1893) 2 Q.B. 318.
2. (1895) A.C. 471.
3. (1924) I.L.R. 49 B. 172.
4. (1929) I.L.R. 52 M. 829 at 835: 57 M.L.J. 618.
5. (1909) I.L.R. 36 C. 960.
6. (1905) I.L.R. 29 M. 118: 16 M.L.J. 37.
7. (1927) 46 C.L.J. 362.

seizure clause came up for decision though the question was not argued as one under S. 74 of the Contract Act. The learned Judges held that "the sum stipulated for to be paid on delivery, apart from the monthly rent stipulated to be paid cannot be claimed back by the hirer even where there is no express provision in the agreement that when the agreement is terminated by the choice of the hirer or by his default, all sums paid by him up to date are to be retained by the owners without giving credit to him for a farthing." The decision mainly rests on the ground that it is a necessary condition in the hire purchase system "for the express purpose of acting as a deterrent to hirers throwing back road-depreciated cars on the hands of the owners". Dunstan also points out that most of the terms in a hire purchase agreement are to protect the interests of the owner and that "this protection is necessary owing to the fact that the hirer obtains power over goods of much greater value than his deposit or yearly instalments warrant." (Dunstan's Hire Purchase Agreements, p. 67.)

The first payment is more in the nature of earnest money and a guarantee for the fulfilment of the contract and it is now settled that where a reasonable amount is deposited with the seller on a contract for sale as security for the completion of the sale, the advance cannot be recovered (see *Natesa Aiyar v. Appavu Padayachi*[8], *Kunwar Chiranjit Singh v. Rai Bahadur Har Swarup*[9] and *Abas Ali v. Kodhusao*[10]). It will have to be set off against actual damage, when a claim is made for damages occasioned by the breach. (See *The President, Vellore Taluk Board v. Gopalasami Naidu*[11] and *Bhai Panna Singh v. Firm Bhai Arjan Singh*[12]). It may be that in the case of an ordinary contract to sell goods where an advance is paid at or about the time of the contract it cannot be presumed to be money paid as security for the performance of the contract. (*Rattamma v. Krishnamurthi*,[13] but see *Ram Kumar Das v. Nanda Kumar Shaha*[14]). But the considerations adverted to in *The Auto Supply Co., Ltd. v. Raghunatha Chetty*[4] and by Dunstan in his

4. (1929) I.L.R. 52 M. 829 at 835: 57 M.L.J. 618.
8. (1913) I.L.R. 38 M. 178: 24 M.L.J. 488 (F.B.).
9. (1925) 50 M.L.J. 629 (P.C.).
10. (1928) 114 I.C. 461: A.I.R. 1929 Nag. 30 (F.B.).
11. (1914) I.L.R. 38 M. 801.
12. (1929) 57 M.L.J. 323 (P.C.).
13. (1927) 54 M.L.J. 40.
14. (1923) I.L.R. 50 C. 639 at 642.

book show that even where there is no provision for forfeiture in a hire purchase agreement, it will be more in accordance with the nature of the contract to imply one even when the amount originally paid is a substantial sum.

Mr. Anantakrishna Aiyar, J., refers also to the analogy suggested in the case under review by Cunliffe, J., namely, that of a tenant who has broken some restrictive covenant in his lease entitling the lessor to re-enter. It cannot be said that the tenant can resist forfeiture and claim payment of the back rent from his landlord. (See *Kammaran Nambiar* v. *Chindan Nambiar*[15].)

The argument based on S. 74 has been urged in several cases where there has been a clause for forfeiture. For example in *Krishna Shetti* v. *Gilbert Pinto*[16] it was relied on to claim relief against forfeiture of a lease and in *Natesa Aiyar* v. *Appavu Padayachi*[8] to be relieved against forfeiture of a deposit made to secure the performance of a contract, but it has always been negatived. Viewed in any light the decision of the case under review seems to be unexceptionable but the observations at page 243 that the "penalty" must be a "separate or an extraneous payment" may be open to doubt.

No doubt generally "penalty" consists of some *"specific extraneous payment"* to be furnished by the party responsible for the breach (see *Rajagopala Padayachi* v. *Varadaraja Padayachi*[17] and *Natesa Aiyar* v. *Appavu Padayachi*[8]), but there may be cases like *Steedman* v. *Drinkle*[18] and *In re Dagenham (Thomes) Dock Co.*,[19] where the Court has relieved against forfeiture on the ground that the extent of the loss by forfeiture was out of all proportion to the amount payable under the contract though there was no "separate payment" to be made. The learned Judge relies on the words "not exceeding the amount so named, or as the case may be, the penalty stipulated for" in S. 74. They may well apply to a case like *The Municipal Board of Allahabad* v. *Tikandar Jang*[20] where default is committed in payment of the full earnest money and the vendor sues to recover the balance of the earnest money. It may here be stated that *The Municipal Board of Allahabad* v. *Tikandar Jang*[20] has not been

8. (1913) I.L.R. 38 M. 178 at 185: 24 M.L.J. 488 (F.B.).
15. (1894) I.L.R. 18 M. 32.
16. (1919) I.L.R. 42 M. 654: 36 M.L.J. 367.
17. (1924) 47 M.L.J. 605.
18. (1916) 1 A.C. 275.
19. L.R. (1873) 8 Ch. 1022.
20. (1915) I.L.R. 38 A. 52.

approved in *Subramanian Chettiar* v. *Arjuna Perumal*[21] on the main question as to how far the vendor can claim to recover the loss occasioned by re-sale when the contract provides for forfeiture of earnest money but not for damages caused by resale. After the amendment of S. 74, the compensation need not necessarily be a sum of money. *Raja of Ramnad* v. *Selachami Tevar*[22] Per Lord Shaw in *Bhai Panna Singh* v. *Firm Bhai Arjan Singh*[12] (arguments).

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12. (1929) 57 M.L.J. 323 at 326 (P.C.).
21. (1916) 37 I.C. 377.
22. (1916) 2 M.W.N. 247.